

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re:

Case No.02-31426 DHW
Chapter 13

CAROLYN M. TUMOLO,

Debtor.

**ORDER DENYING MOTION
TO DISMISS CHAPTER 13 CASE**

ORDER DISGORGING ATTORNEY FEES

**ORDER INCREASING PLAN PAYMENTS
TO MAINTAIN PLAN FEASIBILITY**

On September 6, 2005, the chapter 13 trustee filed a motion to dismiss Carolyn M. Tumolo's chapter 13 case, to impose a 180-day bar on Tumolo's filing another bankruptcy case, and for the disgorgement of Tumolo's attorney's fees. The motion was set for hearing on September 19, 2005. Present at the hearing was Richard D. Shinbaum, attorney for the debtor, and Sabrina L. McKinney, chapter 13 trustees' attorney.

Factual Background

On May 8, 2002, the debtor filed this chapter 13 case. Therein, she listed a workman's compensation claim as an asset of her bankruptcy estate.

On June 28, 2002, William K. Abell filed an application to be employed as an attorney to represent the debtor in the workman's compensation action. On November 14, 2002, pursuant to 11 U.S.C. § 327(e), the court entered an order approving the application to employ counsel.

On July 3, 2002, the debtor's plan was confirmed by the court. The plan provided *inter alia* that all creditors, including those holding unsecured claims, are paid in full.

On July 5, 2002, the chapter 13 trustee filed a motion to modify the debtor's confirmed plan. Here, the trustee proposed to modify the debtor's plan to provide that any recovery in the workman's compensation action be paid under the plan to the trustee for the benefit of unsecured creditors. However, following a hearing on August 5, 2002, the trustee withdrew the motion to modify the plan.

In April 2004 the trustee learned that the workman's compensation action had been settled resulting in a \$15,000 recovery for the debtor. Prior to the settlement, the debtor did not seek approval of the settlement agreement as is required by Fed. R. Bankr. Pro. 9019.¹ From these proceeds Abell disbursed \$11,554.05 to the debtor, \$1,195.95 for expenses, and retained \$2,250.00 as his legal fee.² Abell did not seek final approval of the allowance of his fees as required by 11 U.S.C. § 330. Tumolo did not pay the settlement proceeds to the trustee.

Conclusions

The court is not persuaded that the chapter 13 case should be dismissed. The debtor, whose plan is to pay all creditors in full, was not required by the terms of the confirmed plan to pay over the proceeds of the workman's compensation action to the trustee. Regardless of the disposition of the settlement proceeds, she continues in a 100% repayment plan.

Further, there is no evidence that the debtor acted in bad faith in her retention of these funds. First, she was not required by the confirmed plan to pay the money to the trustee. Secondly, even if she was required to pay these funds to the trustee, she could have easily misunderstood that obligation because Abell, who is a member of the same law firm as her bankruptcy attorney, disbursed the funds to her. Under these circumstances, dismissal of the case is not appropriate.

Counsel, however, has failed to follow the required procedures in his handling of this matter. That failure deprives the court of its role to

¹Recently, on September 16, 2005, the debtor filed an application to approve the settlement. Obviously, the motion is out of time and approval can only be given *nunc pro tunc*.

²The fee is calculated on a 15% contingency basis.

superintend the debtor's dealings with counsel and to ensure fairness to the debtor and the estate with respect to the compromise of disputes. Under these circumstances, sanctions are in order which would justify the disgorgement of all fees. Yet, counsel was successful in his prosecution of the workman's compensation claim and contends that his failure to seek approval of the settlement and of his fees was the result of an oversight. Under these circumstances, the court finds that an appropriate sanction is one-half of counsel's fee. Accordingly, it is

ORDERED that the trustee's motion to dismiss the chapter 13 case with a 180-day injunction on refiling another title 11 case is DENIED. It is further

ORDERED that the trustee's motion to disgorge attorney fees is GRANTED in part. For the foregoing reasons, counsel shall remit one-half of his fee, \$1,125.00, to the chapter 13 trustee for disbursement under the plan. It is further

ORDERED that the trustee is authorized to increase the debtor's periodic plan payments to maintain the feasibility of the plan.

Done this the 5th day of October 2005.

/s/ Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Carolyn M. Tumolo, debtor
William K. Abell, debtor's attorney
Richard D. Shinbaum, debtor's attorney
Curtis C. Reding, chapter 13 trustee